

Supreme Court, U.S.
F I L E D

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No. 90-765

In The
Supreme Court of the United States
October Term, 1990

THE LEXINGTON HERALD-LEADER COMPANY
and JOHN S. CARROLL,
Petitioners,

vs.

REGGIE WARFORD,
Respondent.

*On Petition For a Writ of Certiorari
To the Supreme Court of Kentucky*

RESPONDENT'S BRIEF IN OPPOSITION

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December, 1990

QUESTIONS PRESENTED

Whether the existence of a general concern regarding the proper recruitment of college athletes is a sufficient "particular public controversy" to strip an individual of the protections granted to private persons.

Whether, assuming the existence of a particular public controversy, a passive relationship to the controversy from a noninfluential position is sufficient to transform an individual into a limited purpose public figure.

Whether factual findings of a state court determining the lack of probative value of evidence are reviewable on federal constitutional grounds when the state court had no opportunity to consider the federal question.

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Reggie Warford, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Supreme Court of Kentucky. That opinion is reported at 789 S.W.2d 758 (1990) and may be found at Appendix 1 to the Petition.

OPINIONS BELOW

In addition to relying on those Opinions included in the Petition and Appendix thereto; Respondent has attached hereto, as Appendix 1, the Supreme Court of Kentucky's Order denying permission to supplement the Record on Appeal with a transcript made by Petitioners.

It appears that the transcript cited throughout the Petition is not part of the Record on Appeal. Neither is it available to Respondent. This was a videotaped trial, with no official written transcript. Respondent and this court, therefore, cannot review the cited material or verify its accuracy.

JURISDICTION

This Court lacks jurisdiction to review the judgment on writ of certiorari to the extent that review is sought of the third question presented by Petitioners, relating to the exclusion of nonprobative evidence by the Kentucky Supreme Court.

No federal question was timely or properly raised or determined. The issue was briefed, argued and resolved by the state court solely on the basis of state evidentiary law; thus defeating this Court's jurisdiction.

STATEMENT OF THE CASE

This statement is made in order to correct inaccuracies and omissions contained in the Petition.

The Publication

Respondent initiated this suit as a result of Petitioners' publication entitled the "NCAA Reprint." The allegations concerning the Respondent were printed in the Petition and need not be repeated here. This publication was sent to nearly every potential employer of the Respondent as well as being distributed at an NCAA convention in New Orleans. (Tape 10, 1/24/89, 09:30:19 - 09:38:09). Prior to the defamation, Reggie Warford had been gainfully employed as an assistant basketball coach for approximately ten years. Since the NCAA Reprint, Reggie Warford has not been able to get a coaching position. (Tape 3, 1/10/90, 16:17:48 - 16:29:43; 17:10:31 - 17:13:26). This, despite the fact that neither Reggie Warford nor the University of Pittsburgh received any NCAA sanctions as a result of these allegations. *Id.* at 16:40:43 - 16:41:16.

Respondent's Employment

When Petitioners published the NCAA Reprint in 1986 Reggie Warford was employed as an assistant basketball coach at the University of Pittsburgh (hereinafter "Pittsburgh"). Prior to that, he was an assistant basketball coach at Iowa State from 1976 - 1980. At Iowa he recruited players but was neither the chief recruiter nor the recruiting co-ordinator. At Pittsburgh, the same was true; Respondent had recruiting responsibilities, but was not the coordinator. (Tape 2, 1/10/89, 08:38:40 - 08:41:42). When Reggie Warford took the Pittsburgh job, the school was part of an obscure basketball conference, the Eastern Eight. Pittsburgh was known for football, with minimal attention given to basketball. (R.O.A., deposition vol. 15 at 25).

In 1983, Pittsburgh joined the Big East Conference which provided more television exposure and recruiting

advantages for the team. (Tape 2, 1/10/89, 08:51:44 - 08:55:30). The move did not increase the notoriety of assistant coaches. The head coach, Roy Chipman, testified that "Assistant coaches perennially or just, over the years, just don't get the kind of publicity that head coaches do." (R.O.A., deposition vol. 15 at 20). Respondent was in no position to make policy regarding the team. "You have to remember," Chipman testified, "that basically everything [that] was fed out of the basketball program, regardless of what it was, came through me." *Id.* at 231.

Petitioners' expert, Richard Lapchick, concurred with this view. Lapchick makes his living studying sports, in Boston - the heart of Big East territory. Lapchick testified that prior to the publication he had not heard of Reggie Warford. He further stated that assistant coaches receive little media attention; that there was no controversy concerning athletics at Pittsburgh when Warford was hired; that Warford was not a spokesperson on recruiting or on the proper role of sports in higher education; that Warford had never published on the issue of recruiting; that Warford had neither attempted to influence any controversy surrounding recruiting, nor change policies on recruiting, nor had he exerted discernible influence over the manner in which recruiting is done. Perhaps most importantly, Lapchick testified that Warford had not been personally involved in any recruiting controversy. (R.O.A., deposition vol. 16 at 100 - 104).

This is the individual whom Petitioners' seek to render a public figure - someone from a lower-level position with no sphere of influence and no history of active involvement in any form of a purported national controversy concerning athletics.

Proceedings Below

The trial court twice considered the public figure question. Initially the court determined Respondent to be

a private individual¹ Five days before trial, the court reversed itself, holding that Respondent was a public figure. (Petitioners' Appendix at 49 - 54).

In a rare unanimous opinion, the Supreme Court of Kentucky reversed this ruling as well as an evidentiary ruling which had permitted irrelevant evidence to be admitted. (Petitioners' Appendix at 1 - 39). On the public figure question, the Kentucky court engaged in a lengthy and thoughtful review of this Court's previous opinions. See, *Warford v. Lexington Herald-Leader Co.*, *supra* 761 - 766 or Petitioners' Appendix at 6 - 18 (hereinafter "Appendix"). The court then concluded that neither requisite for public figure status was met in this situation. The Kentucky court held that "the 'nationwide controversy regarding recruitment of college athletes' is too general a statement of a public controversy to be the axis of debate." *Id.* at 767 or Appendix at 21. It went on to find that:

A general public concern about recruiting violations, like the general public concern about wasteful public expenditures is not sufficient to qualify a grant recipient or assistant basketball coach as a public figure if neither is surrounded by a specific controversy.

¹ The trial court held: "The plaintiff simply does not meet the requirements of the case law for being a public figure. First, there was not even a hint of controversy regarding recruiting violations at Pittsburgh when the Plaintiff was hired. In fact, the Plaintiff was in no way connected to any controversy surrounding college athletic recruiting until the Defendants published their articles. Second, the Plaintiff clearly did not thrust himself into any controversy regarding illegal recruiting nor did he attempt to influence its outcome.

"The plain and simple fact is that the Plaintiff was a background figure at Pittsburgh The Plaintiff was not someone who invited attention and comment. Thus, the Plaintiff is not a public figure." (Petitioners' Appendix at 47 - 48).

Id. at 767 - 768 or Appendix at 21 - 22, citations omitted.

After determining that there was no 'particular public controversy' the court proceeded to analyze Warford's participation and role based upon the standards and methods delineated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) and its progeny. Disagreeing with Petitioners' position that "it is irrelevant that appellant [Respondent here] never publicly spoke out on recruiting issues and did not enjoy name recognition or a prominent position in college basketball coaching," the court concluded that Respondent's involvement in the public concern was insufficient to accord him public figure status. *Id.* at 769 - 771 or Appendix at 25 - 31.

The court then turned to an evidentiary ruling based upon state common law which the Petitioners' now desire to have reviewed upon federal constitutional grounds. Contrary to Petitioners' contentions, the Supreme Court of Kentucky concluded that the evidence to be excluded on retrial was *not* corroborative of the defense of truth. *Id.* at 773 - 74 or Appendix at 37 - 39. This issue was determined solely on state law grounds; no purported federal question was raised until Petitioners' [then Appellees] petition for rehearing. (Petition at 16. fn. 3). The court summarily denied the petition for rehearing without considering the question. (Petitioners' Appendix at 40). Thus, no substantial federal question was timely raised or decided.

REASONS FOR DENYING THE WRIT

The petition presents no credible questions for review by this Court. A review of the decision by the Supreme Court of Kentucky shows no conflict, direct or indirect, with precedent set by this Court and other federal

and state decisions. To the contrary, the Kentucky opinion correctly applies the principles and methods established by this Court for the determination of public figure status.

With regard to the evidentiary ruling, not only is Petitioners' failure to timely raise this issue jurisdictionally fatal; but the holding turns solely on an analysis of the factual findings. This matter is not of sufficient importance to warrant review as it involves only a question of evidence and the factual findings adduced therefrom.

1. The Decision Below Concerning Public Figures is Consistent with This Court's Prior Decisions

The Supreme Court of Kentucky correctly followed the controlling precedents set by *Gertz, supra*; *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Wolston v. Readers' Digest Association, Inc., Inc.*, 443 U.S. 157 (1979); and, *Hutchinson v. Proxmire*, 443 U.S. 111 (1979). The Petitioners argue that the decision below was in error and misconstrued the applicable law. Petitioners are in error. The court below correctly applied the principles enunciated in *Gertz* to the facts present. The court below did not narrowly construe the issue; rather, Petitioners have chosen to narrowly interpret the court's decision.

A. The Court Below Correctly Held that the General Concern About College Athletics is not a Particular Public Controversy

In making the public figure determination, the lower court stated that it must first decide whether a "particular and identifiable public controversy" existed. *Warford, supra* at 766 or Appendix at 18. Despite Petitioners' allegations of a "national" controversy, the Kentucky court found, after reviewing the facts, that Petitioners' formulation was

"too general a statement of public controversy to be the axis of debate," stating that "[c]ertainly, in 1985 there was no legitimate controversy or debate about the desirability of NCAA rules violations." *Id.* at 767 or Appendix at 21. The Kentucky court compared the case at bar to the situations existing in *Wolston v. Readers' Digest, supra*, and *Time, Inc., v. Firestone, supra*, and concluded that the "public controversy requirement of the *Gertz* test ha[d] not been met." *Warford, supra*, at 769 and Appendix at 25.

Petitioners mistakenly characterized the Kentucky court's holding to require a pre-existing local controversy. The Supreme Court of Kentucky not only found that no specific controversy existed in which Respondent could be involved, they also (and primarily) held that the general concern advanced by Petitioners was insufficient to rise to the level of a "controversy." As this Court has noted: "It is difficult to determine with precision the 'public controversy' in to which petitioner is alleged to have thrust himself." *Wolston, supra*, at 166 fn. 8.

The allegedly conflicting decisions argued by Petitioner are easily reconcilable on their facts. *Tavoulareas v. Piro*, 817 F.2d 762 (D.C. Cir. 1987)(en banc), *cert. denied*, 484 U.S. 870 (1987) (corporate president was activist supporting industry and limited-purpose public figure for controversy concerning the need to reform the structure and management of private oil industry); *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123 (2d Cir. 1984)(controversial author of racy fiction on the issues of contemporary standards of nudity in print and film and sexual mores). Clearly the controversies defined in the cases above stand in stark contrast to the vague general concern advanced by petitioners as a public controversy.

Despite Petitioners' claim that a controversy existed in this case, the law and principles established by this

Court are clear. There is no conflict in the method in which the courts above and the Kentucky court decided the public controversy question, and no infringement on the right of free speech. The Kentucky court simply applied the *Gertz* principles to the specific facts of this case. Thus there is no "conflict" requiring this Court's review.

B. Respondent's Role in Any Controversy Was Too Minute to Deprive Him of Private Individual Status

Even had a sufficient particular public controversy existed in this case (which it did not), Respondent still remains a private individual due his insignificant role in any such controversy. Again Petitioners have narrowly construed and mischaracterized the Kentucky opinion. It did not state and does not hold that Respondent is not a public figure solely because he has not 'spoken' out as Petitioners would have this Court believe. Rather, the opinion stands for the proposition that, under the *Gertz* standard of "looking to the nature and extent of an individual's participation in the particular controversy," *Gertz, supra*, at 352, "[r]espondent did not have a sufficient role in any purported controversy to be a public figure." *Warford, supra*, at 769 - 771 or Appendix 25 - 29.

Although the Kentucky court reviewed and analyzed this Court's prior opinions, it disagreed with Petitioners' reading of these cases, and correctly concluded under the standards adopted by this Court that Respondent had not assumed the risk of public scrutiny. *Warford* at 770 or Appendix at 28. Further, common sense dictates that if a controversy is defined as broadly and generally as the Petitioners argue here, it is inconceivable that a lower-level

assistant could have the power and ability to influence the resolution.²

Petitioners have not demonstrated that conflicting decisions exist on this issue. Reduced to its essence, Petitioners' claims merely reflect a disagreement with the results reached by the lower court, not the principles and methods employed. As before, the conflicts cited by Petitioners are easily distinguished on their facts, *Trotter v. Anderson*, 818 F.2d 431 (5th Cir. 1987) (plaintiff was the president of a bottling company, and was a central figure in a publicized union battle); *McDowell v. Paiewonsky*, 769 F.2d 942 (3rd Cir. 1985) (plaintiff was a high-profile architect, inextricably connected in public's mind with public projects he built) (*Clyburn v. New World Communications, Inc.*, 993 F.2d 29 (D.C. Cir. 1990)(plaintiff was a consultant who held contracts with the District of Columbia, was socially connected with a drug scandal involving city officials, and made false public statements concerning the drug controversy).³

As the Kentucky Court found, the Respondent, Reggie Warford, stands in contrast to these influential positions. He did not speak out on recruiting, had not published on the subject, exerted no influence over the

² As was noted in *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1297 fn. 27 (D.C. Cir. 1980) *cert. denied*, 449 U.S. 898 (1980): "We do not believe it necessary to state that a court should define the controversy 'narrowly' or 'broadly.' A narrow controversy will have fewer participants overall, and thus fewer who meet the required level of involvement. A broad controversy will have more participants, but few can have the necessary impact."

³ See also: *Marcone v. Penthouse Int'l. Magazine for Men*, 754 F.2d 1072 (3rd Cir.), *cert. denied*, 474 U.S. 864 (1980)(plaintiff indicted for drug trafficking, had represented "notorious" motorcycle gangs, and had social ties with the gangs); *Dameron v. Washington Magazine*, 779 F.2d 736 (D.C. Cir. 1985) *cert. denied*, 476 U.S. 1141 (1986)(plaintiff was a central figure in the specific and discrete public controversy surrounding an airliner crash).

manner in which recruiting was done, and was not personally involved in any recruiting controversy. He was an individual from a lower level non-decision making position who was not well-known within his industry. See Statement of the Case, *supra*, at 4. Indeed, he was not known to the President of the NCAA until that individual was contacted by Petitioners to testify. (R.O.A. deposition of Bailey, vol. 12 at 48 - 49).

Hence, there is no conflict between the decisions of this Court, those of other assorted courts, and the Kentucky Court. Petitioners simply have failed to correctly interpret *Gertz, supra*, or to demonstrate that any other court has interpreted *Gertz* as they have, or to show any intrusion into the rights guaranteed by the First Amendment. In the language of *Gertz, supra*, at 345, Respondent did not "thrust [himself] to the forefront of any particular public controversy [by word, deed, or position] in order to influence the resolution of the issues involved." This decision does not merit review.

2. The Evidentiary Ruling Below is not Subject to Review

As stated in previous sections, the evidentiary ruling excluding evidence of other purported bad acts was rendered solely on state law grounds. Petitioners acknowledged that they first raised a federal question in their petition for rehearing. (Petition at 16 fn. 3). Raising a federal question for the first time in a petition for rehearing to the state high court is insufficient for United States Supreme Court jurisdiction to attach, unless the state court entertains the petition and expressly decides the federal question. *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945).

In the present case, the Supreme Court of Kentucky issued a one-line order that stated "Appellee's petition for rehearing is denied." (Petitioners' Appendix at 40). The order denying rehearing in no way indicated that a federal question was considered. Thus, the judgment is not reviewable. *Radio Station WOW v. Johnson, supra*, at 128; *Forbes v. State Council*, 216 U.S. 396, 399 (1910).

Neither can Petitioners allege surprise. They could have raised any purported federal question prior to this time, in briefs before either the trial court or the state supreme court, but chose not to do so. As the petition for rehearing was not Petitioners' first opportunity to assert the question, jurisdiction does not attach. *Brinkerhoff-Faris Trust Co. v. Hill*, 281 U.S. 673, 677-78 (1930).

Even if the question had been raised timely, this issue is not appropriate for review. Petitioners ask this Court to examine and reverse a ruling based solely upon factual findings by the Kentucky court that the excluded evidence is not probative of the truth/falsity of Petitioners' allegations. Effectively, Petitioners ask this Court to resolve an underlying factual dispute, *not* constitutional questions. As this Court stated long ago "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925).

In the final analysis, the Supreme Court of Kentucky correctly decided a state evidentiary question on adequate and independent state grounds, without a federal question being put before it. The facts relating to that evidentiary ruling and the ruling itself do not merit this Court's consideration.

CONCLUSION

For all the reasons stated, both hereinabove and in the opinion of the Supreme Court of Kentucky, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

App. 1

SUPREME COURT OF KENTUCKY

89-SC-181-TG

REGGIE WARFORD

APPELLANT

V.

APPEAL FROM
FAYETTE CIRCUIT COURT
HONORABLE JAMES E. KELLER, JUDGE
86-CI-004251

LEXINGTON HERALD-LEADER
COMPANY, ET AL.

APPELLEE

ORDER

The parties' joint motion for an extension of time in which to file their briefs in the above-styled action is granted. Appellant shall file his brief within sixty (60) days of the date of the entry of this order. Appellees' shall file their brief within sixty (60) days of the date of the filing of appellant's brief.

The parties' joint motion to supplement the record on appeal with a partial, unofficial transcript of the proceedings before the Fayette Circuit Court in the above-styled action is denied.

Vance, Wintersheimer, Combs and Gant, JJ., sitting. All concur.

ENTERED May 31, 1989.

/s/ Robert F. Stephens
Chief Justice